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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SHARPER IMAGE CORPORATION,
Petitioner,
v.
DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

BRIEF OF *AMICUS CURIAE* COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the petitioner in the above captioned matter.[1] The Committee On State Taxation (COST) is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorporated on January 1, 1992, has a

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members or counsel, has made a monetary contribution to the preparation or submission of this brief. Written consents of the petitioner and respondent have been obtained and filed with the Clerk of the Court.

membership of over 500 multi-state corporations engaged in interstate and international commerce. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities.

Many of COST's members are engaged in business in the State of Florida and thus have a particular interest in the remedial landscape in Florida, as well as other States. COST has filed *amicus curiae* briefs in two other cases before this Court concerning Florida's refusal to adhere to the Due Process Clause requirements related to unconstitutionally collected taxes. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), and *Newsweek, Inc. v. Department of Rev. of the State of Florida*, 522 U.S. 442 (1998). COST and its members are alarmed at Florida's persistent refusal to provide remedies that comport with the Due Process Clause. Further, the availability of remedies for unconstitutional taxes directly affects COST's members business activities in Florida by depriving them of constitutional rights enjoyed in other States. Therefore, COST has an interest in this case.

SUMMARY OF ARGUMENT

For at least the fourth time in ten years (and the third time in three years) this Court is asked to overturn a Florida court's decision to ignore Due Process demands relating to remedies for state taxes ultimately determined to be unconstitutional. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990); *Dryden v. Madison County*, 118 S. Ct. 1162 (1998); and *Newsweek, Inc. v. Department of Revenue*, 522 U.S. 442 (1998). As in the past, the State is attempting to avoid any consequences of imposing an unconstitutional tax by limiting its exposure to prospective only relief. Prospective only treatment directly contravenes several decisions by this Court, including *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) and *McKesson Corp. v. Division*

of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990). Nevertheless, the Florida court in this case concluded that *McKesson* is limited in several respects, including applying only to postdeprivation remedy cases and cases where discrimination is present. Neither view of *McKesson* has any merit. This Court has made clear that the Due Process Clause applies to both post and predeprivation remedies and, unlike the Commerce Clause, the Due Process Clause does not have a discrimination against interstate commerce component. Finally, the Florida court's attempt to hide behind a state law that strikes the offensive unconstitutional tax exemption rather than the tax is not an adequate basis for upholding the imposition of the unconstitutional tax on the Petitioner because state law cannot trump the Due Process Clause of the United States Constitution.

The Petitioner is entitled to a remedy that conforms to the Due Process Clause. The Court of Appeals' attempt to provide a prospective only remedy should be summarily reversed.

ARGUMENT

FLORIDA'S LATEST TACTIC TO RETAIN AN UNCONSTITUTIONALLY IMPOSED TAX IS NO DIFFERENT, AND SHOULD BE TREATED NO DIFFERENTLY, THAN ITS PRIOR ATTEMPTS TO LIMIT RELIEF TO A PROSPECTIVE ONLY BASIS.

This case presents no new or novel legal theory. Rather, this Court is asked once again to specifically direct Florida to comply with, and not flout, the Due Process Clause contained in the Fourteenth Amendment to the United States Constitution. U.S. Const. art. I, § 8, cl. 3. Florida, like several other States, has found itself in the predicament of deciding how to remedy an unconstitutionally imposed tax. Over seventy years ago this Court declared that States may not provide prospective only relief for unconstitutionally collected state taxes. *See, McKesson Corp. v. Division of Alcoholic Beverage and Tobacco,* 496 U.S. 18, 34-35 (1990) *citing Montana Nat'l Bank of Billings v.*

Yellowstone County, 276 U.S. 499, 504 (1928) ("prospective relief alone 'did not cure the mischief which had been done under the earlier [unconstitutional] construction.' "). Unfortunately, Florida has consistently ignored this Court's clear jurisprudence on the issue.

The Petitioner protested Florida's use tax on its distribution of catalogs within the State because the use tax violated the First Amendment to the United States Constitution.[2] The Petitioner availed itself of a statutorily authorized predeprivation procedure and timely protested the use tax prior to paying the State. The Florida Court of Appeals recognized that the tax scheme was unconstitutional, but nevertheless determined that the Petitioner was entitled only to prospective relief and remained liable for the tax for prior periods. *Sharper Image Corp. v. Department of Revenue*, 704 So. 2d 657, 662 (1997). Thus, Florida applied a "heads I win, tails you lose" approach and found that despite the unconstitutional nature of the tax, the Petitioner is still required to pay it.[3] The Florida Court of Appeals premised its decision on finding that: *McKesson* is inapplicable as it concerned a postdeprivation, not predeprivation, remedy; State law requires that the unconstitutional exemption, and not the tax, be eliminated; and, finally, that the Petitioner is not entitled to a "full refund remedy" because the tax does not create a competitive disadvantage. *Sharper Image*, 704 So. 2d at 663-664 (1997). Each of the Court of Appeals' justifications do not support a prospective only remedy and, therefore, the Court of Appeals should be summarily reversed.

In *McKesson*, the Florida Supreme Court found that a Florida tax unconstitutionally discriminated against inter-

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[2] *See, Department of Revenue v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459 (Fla. 1992).

[3] "Irrespective of the illegality of the exemptions, [the Petitioner] is not entitled to the remedy it seeks." *Sharper Image Corp. v. Department of Revenue*, 704 So. 2d 657, 658 (1997).

state commerce but provided prospective only relief. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 524 So. 2d 1000 (1988). The court premised its denial of meaningful backward looking relief on its determination that the State relied in good faith on a presumptively valid statute and the taxpayer would receive a windfall if it received a refund of a tax likely passed on to customers. *Id.* at 1010. This Court framed the issue as "whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 31 (1990). In reversing the Florida Supreme Court, the *McKesson* Court held that the State must provide two elements: "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by *preventing any permanent unlawful deprivation of property.*" *Id.* at 36-37 (emphasis added).

In the present case, the Florida Court of Appeals distinguished *McKesson,* in part, because the "due process concerns in *McKesson,* which formed the basis of the Supreme Court's 'meaningful backward looking remedy' decree, are not present here." *Sharper Image,* 704 So. 2d at 662. In other words, the Court of Appeals determined that this Court's Due Process decisions concerning post-deprivation remedies do not apply to a case involving a predeprivation remedy. This distinction defies logic and this Court's decisions. "Under *McKesson,* [the State] has the flexibility to maintain an exclusively predeprivation remedial scheme, *so long as that scheme is 'clear and certain.'*" *Reich v. Collins,* 513 U.S. 106, 110-11 (1994) (emphasis added). Florida's insistence on enforcing its unconstitutional tax on the Petitioner, despite the Petitioner's success on the merits, does not amount to a "clear and certain" remedy as required by the Due Process Clause. In fact, it is no remedy at all.

This is not the first case in which a Florida court has accepted razor thin arguments in attempting to distinguish *McKesson* and enhance the State fisc. In *Dryden v. Madison County*, 696 So. 2d 728 (Fla. 1997), the Florida Supreme Court found that a governmental entity need not refund illegally collected taxes. The court distinguished *McKesson* because the "individual tax scheme applies across the board and confers a commensurate benefit." *Id.* at 730. The Florida court's spurious decision was not supported by this Court's jurisprudence and was devoid of any authority supporting its conclusion. This Court ultimately vacated and remanded the Florida court's decision. *Dryden v. Madison County*, 118 S. Ct. 1162 (1998).

The Florida Court of Appeals is of the mistaken view that while the State must refund an unconstitutional tax, the State may continue to collect an unconstitutional tax. In finding *McKesson* inapplicable to predeprivation remedies, the Court of Appeals relied on its earlier decision in *Newsweek, Inc. v. Department of Revenue*, 689 So. 2d 361 (Fla. 1st DCA 1997). *Sharper Image*, 704 So. 2d at 663. In *Newsweek*, the taxpayer sought a refund of the same unconstitutional tax imposed on publications at issue in the present case. In reversing, this Court noted that under *Reich v. Collins*, 513 U.S. 106 (1994), the State must not employ a "bait and switch" approach to the availability of remedies. *Newsweek, Inc. v. Department of Revenue*, 522 U.S. 442 (1998) (per curiam). This Court found that Newsweek could avail itself of a postdeprivation remedy despite the presence of a predeprivation remedy.

As in *Newsweek*, the challenged Florida tax has been found unconstitutional; nevertheless, the Florida Court of Appeals has determined that the Petitioner must still pay the unconstitutional tax. If Newsweek is entitled to recover the unconstitutional tax through a postdeprivation remedy, then the Petitioner must not be *forced* to pay it because it selected a predeprivation remedy. However, if

the Court does not agree to grant the petition for a writ of *certiorari*, that is exactly what will happen.

The Court of Appeals also erroneously rested its decision on a state law which requires that the exemption, and not the tax, be eliminated to remedy the unconstitutional taxing scheme. *Sharper Image*, 704 So. 2d at 663. While this remedy may cure the unconstitutional defect, it will do so on a prospective basis only—a result Florida has sought, and been denied, in the past. *See, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So. 2d 1000 (1988). This Court has expressly rejected a State's attempt to use a State law to override the Due Process Clause. In *Harper v. Virginia Dep't of Taxation*, Virginia's contention that State law provided a basis for providing prospective only relief of an unconstitutional tax violated the Supremacy Clause. 509 U.S. 86, 100 (1993). Absent intervention by this Court, Florida will elude the Due Process Clause requirements of a constitutional remedy and unlawfully deprive Petitioner of its property. Making matters worse, other States may be encouraged to follow Florida's lead in its incessant attempts to limit relief from an unconstitutional tax to a prospective basis.

Finally, the Florida court found that the Petitioner was required to pay the tax because the unconstitutional exemption did not create an economic disadvantage. *Sharper Image*, 704 So.2d at 664. The court, in another contrived attempt to distinguish *McKesson*, grafted a discrimination against interstate commerce requirement onto the Due Process Clause. While *McKesson* and other United States Supreme Court remedy decisions result from challenges to state taxes under the Commerce Clause, a Commerce Clause violation does not serve as a condition precedent to relief under the Due Process Clause. *See, e.g., Carpenter v. Shaw*, 280 U.S. 363 (1929). "A denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion

is itself in contravention of the Fourteenth Amendment." *Id.* at 369. The Due Process boundaries of proper state remedies apply equally to *all* unconstitutionally imposed state taxes, regardless of the portion of the United States Constitution that is violated. Thus, while economic discrimination may be relevant in determining whether it passes Commerce Clause muster, such an analysis has no bearing on the required remedy pursuant to the Due Process Clause.

CONCLUSION

The Florida Court of Appeals' decision to uphold the imposition of an unconstitutional tax violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The court's decision represents clear error and should be summarily reversed.

Respectfully submitted,

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